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No. 92-1931

In the Supreme Court of the United States

OCTOBER TERM, 1993

BERTHA GARELICK, ET AL., PETITIONERS

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether 42 U.S.C. 1395w-4(g), which limits the fees physicians may charge Medicare beneficiaries, results in a taking of private property without just compensation, in violation of the Fifth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1391

BERTHA GARELICK, ET AL., PETITIONERS

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 987 F.2d 913. The district court's opinion and order of February 14, 1992 (Pet. App. B1-B13), as amended by its order of April 24, 1992 (Pet. App. D1), is reported at 784 F. Supp. 108. The district court's opinion and order of March 24, 1992 (Pet. App. C1-C4) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1993. The petition for a writ of certiorari was filed on June 3, 1993. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress established the Medicare program in 1965 to provide health care for the aged and disabled. See 42 U.S.C. 1395 *et seq.* Under Part B of the Medicare program, eligible individuals may purchase insurance that generally pays 80% of a "federally determined amount" for covered medical services. 42 U.S.C. 1395*l* (Supp. III 1991). The federally determined amount reflects the value of the services, adjusted to take geographic and other considerations into account. 42 U.S.C. 1395w-4(b)(1) (Supp. III 1991).

Under the Medicare program, "participating physicians" agree in advance not to charge Medicare patients more than the federally determined amount for their services, and they are paid by the Medicare program pursuant to an assignment agreement. Thus, a participating physician receives 80% of the federally determined amount directly from the Medicare program, is permitted to bill the patient for the remaining 20%, and agrees not to seek any further payment.

The Medicare program also pays 80% of the federally determined amount for medical services furnished by a physician who treats a Medicare patient but does not accept assignment of the Medicare claim for that service. In such a case, the Medicare program pays the beneficiary, and the physician must look to the beneficiary for payment. Since 1984, Congress has imposed limitations on the fees physicians who do not accept assignment may charge Medicare beneficiaries. In 1989, Congress enacted the provision challenged here, 42 U.S.C. 1395w-4(g)(2) (Supp. III 1991), which prohibits physicians who do not accept assignments from charging Medicare

beneficiaries more than a set percentage of the federally determined amount for their services. For most services rendered after 1992, Section 1395w-4(g)(2) (Supp. III 1991) precludes physicians who do not accept assignment from charging Medicare beneficiaries more than 115% of the fees allowed participating physicians.

In short, under the Part B program Medicare pays 80% of the federally determined amount for covered services. No physician is required by the Medicare program to care for Medicare patients. But if they do so and obtain direct payment from Medicare by assignment, they may not seek more than the remaining 20% from the patient. Physicians who do not accept assignment may not obtain more than 115% of the federally determined amount.

2. Petitioners are three anesthesiologists who contend that the 115% limit constitutes a taking of property without just compensation, in violation of the Fifth Amendment. Pet. 7. They sought a declaratory judgment to that effect and an injunction barring enforcement of Section 1395w-4(g)(2) (Supp. III 1991) with respect to hospital-based anesthesia services. C.A. App. A21.[1]

The district court, ruling on cross-motions for summary judgment, rejected petitioners' contention that the Act effects an unconstitutional taking without just compensation. The court reasoned, first,

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[1] The complaint also named as plaintiffs three Medicare beneficiaries who raised various other constitutional challenges to the 115% limit. The district court held that the beneficiaries lacked standing (Pet. App. B7), the court of appeals affirmed that ruling (*id.* at A15), and the petition does not challenge that ruling or otherwise raise any claim besides the takings claim.

that the 115% limit does not take petitioners' property because petitioners "may decline to serve Medicare patients." Pet. App. B10. The court further held that, in any event, petitioners had failed to demonstrate that the 115% limit "is insufficient to afford plaintiffs reasonable compensation for their services." *Id.* at B13.

The district court subsequently denied petitioners' motion for reconsideration. It concluded that petitioners are not compelled to serve Medicare beneficiaries notwithstanding various voluntarily adopted professional standards and guidelines pertaining to the quality and availability of anesthetic care. It also concluded that any diminution of the "asset value" of the physicians' medical expertise caused by the 115% limit does not amount to a taking for purposes of the Fifth Amendment. Pet. App. C2-C3.

3. The court of appeals affirmed. Pet. App. A1-A15. Like the district court, the court of appeals first concluded that the statute does not result in a taking because it does not compel physicians to serve Medicare beneficiaries and subject themselves to the 115% limitation. *Id.* at A6-A7. The court of appeals further rejected petitioners' argument that various state regulations, voluntary professional standards governing the quality and availability of care, and the economics of petitioners' professional practice supplied the necessary element of compulsion. First, it held that the state law provisions on which petitioners relied, which require hospitals to refrain from discriminating against patients on the basis of the source of payment (see N.Y. Comp. Codes R. & Regs. tit. 10, § 405.7 (1969)), do not apply to individual physicians, and that in any event state-law

requirements do not determine whether a federal statutory scheme results in a taking of property within the meaning of the Fifth Amendment. Pet. App A9. Second, the court held that voluntary practice standards are self-imposed requirements and therefore do not constitute governmental compulsion to employ property for a public purpose. *Id.* at A10. Third, the court held that economic inducement to participate in the Medicare program does not compel petitioners to serve Medicare beneficiaries and thereby subject themselves to governmental regulation of their professional fees. *Ibid.*

The court also rejected petitioners' contention that the Act results in a taking because it requires selected private individuals to bear the burden of remedying "a social ill that the regulated property owner has neither contributed to nor created." Pet. App. A10. The court reasoned that this approach, although articulated in Justice Scalia's separate opinion in *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988), has not been adopted by a majority of this Court and does not reflect controlling precedent. That controlling precedent preserves the government's "broad power to determine the proper subjects of and purposes for regulatory schemes." Pet. App. A11.

ARGUMENT

The court of appeals correctly held that federal regulation of the fees charged Medicare patients is not a "taking" of property without just compensation. The court of appeals also correctly noted that "[a]ll court decisions * * * that have considered takings challenges by physicians to Medicare price regulations have rejected them in the recognition that

participation in Medicare is voluntary." Pet. App. A8. Further review therefore is not warranted.

1. The Fifth Amendment provides that private property shall not "be taken for public use without just compensation." Petitioners' central contention is that the challenged statutory provision results in a taking because, by limiting their fees to 115% of the federally determined amount, the provision forces them to employ their property to further a public purpose—subsidization of medical services for elderly and disabled Medicare patients—whose burden should be borne by the public as a whole. Pet. 7-8. That argument is incorrect, however, for at least two independent reasons.

a. First, as the court of appeals held, the Medicare Act does not compel petitioners to care for Medicare beneficiaries and thereby subject themselves to the 115% limit. There is no taking of private property by the federal government where no federal statute requires persons to use their property for a public purpose in the first instance. *Bowles* v. *Willingham*, 321 U.S. 503, 517 (1944) (federal rent control regulation did not effect a taking where the federal statute did not require the property to be used for purposes that would subject the owner to price regulation). The courts of appeals have uniformly rejected takings challenges to the Medicare Act on the ground that it does not require physicians to care for Medicare patients. *Whitney* v. *Heckler*, 780 F.2d 963, 972 (11th Cir.) (temporary freeze of Medicare payments is not a taking because physicians are not required to treat Medicare patients), cert. denied, 479 U.S. 813 (1986); *Burditt* v. *United States Dep't of Health & Human Services*, 934 F.2d 1362, 1376 n.12 (5th Cir. 1991)

(Medicare requirement that hospitals provide certain emergency care services does not take physicians' property because individual physicians are not required to provide such care).

Petitioners maintain that a web of state regulation and professional ethical obligations effectively compels them to treat Medicare beneficiaries and thereby subject themselves to the 115% limit. As an initial matter, petitioners' assertion that state law requires them to serve Medicare beneficiaries is incorrect. Petitioners rely on New York State's "Patient Bill of Rights," which provides in pertinent part that a "hospital shall afford to each patient the right to * * * treatment without discrimination as to * * * source of payment." N.Y. Comp. Codes R. & Regs. tit. 10, § 405.7(b)(2) (1969). As the court of appeals noted, that provision applies to hospitals, not individual physicians. Pet. App. A9. It thus plainly has no application to an anesthesiologist who provides out-patient services, and does not necessarily apply to all anesthesiologists who provide in-patient services. In any event, none of petitioners' contentions, even if correct, would demonstrate that it is the federal statute challenged here that caused any taking of petitioner's property, and we are not aware of any case holding that requirements imposed by a state government or private organization can render an otherwise valid federal legislative enactment constitutionally infirm.[2]

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[2] Moreover, the basis for petitioners' claim—that the Medicare statute has taken their property by limiting the return on their investment in education and training—is novel. We are aware of no case upholding a takings claim based on such a theory. See *Burditt*, 934 F.2d at 1376 & n.12. The Court

b. Even if we assume, for purposes of argument, that the Medicare Act compels petitioners to employ their property for a public purpose, the relevant inquiry requires consideration of (1) the character of the governmental action, (2) the severity of the economic impact on the claimant, and (3) whether the statute interferes with reasonable investment-backed expectations. See, *e.g.*, *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust For Southern California*, 113 S. Ct. 2264, 2290-2291 (1993). The 115% limit does not amount to a taking under that test.

First, governmental regulation of prices charged for important goods and services is an exercise of the government's police power to further the general public good, rather than to invade or convert property for a public purpose. Any interference with private economic interests "arises from a public program that adjusts the benefits and burdens of economic life

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has never suggested that the Constitution requires a particular return on investment in education and professional training. The Court has extended the protections of the Just Compensation Clause to intangible assets only where some independent source of law gives rise to a reasonable expectation that the asset in question will be safeguarded from interference or economic impairment. Cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1001-1004 (1984); *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124-125 (1978). Petitioners have not identified any settled rule, understanding, or source of law that would afford them a constitutionally protected property interest in some particular rate of return on whatever resources they have invested in their professional education and training. Thus, although the court of appeals did not reach the issue, its judgment would stand on the alternative ground that Medicare regulation of professional fees does not take private property within the meaning of the Just Compensation Clause.

to promote the common good and, under [the Court's] cases, does not constitute a taking requiring Government compensation." *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986).

Second, the Medicare Act does not have a severe impact on physicians' fees. As an initial matter, it should be kept in mind that, by providing a source of payment for 80% of the federally determined amount, the Act has a favorable economic effect on physicians. Moreover, the limit challenged here merely prevents physicians from collecting more than 115% of the federally determined amount. As this Court stated in *Concrete Pipe*, 113 S. Ct. at 2291, it is "long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking. See, *e.g.*, *Euclid* v. *Amber Realty Co.*, 272 U.S. 365, 384 (1926) (approximately 75% diminution in value); *Hadacheck* v. *Sebastian*, 239 U.S. 394, 405 (1915) (92.5% diminution)." In light of those holdings, it is clear that petitioners—who have "not attempted nor even offered to establish that this level of remuneration does not adequately compensate hospital-based physicians for their services," Pet. App. B13—have no viable claim that the 115% limit has taken their property.

Third, the Act does not unduly interfere with any of petitioners' reasonable, investment-backed expectations. Health care is a pervasively regulated field, and Congress has specifically imposed restrictions on the fees physicians may charge Medicare beneficiaries since 1984. See Medicare and Medicaid Budget Reconciliation Amendments of 1984, Pub. L. No. 98-369, Tit. III, § 2306, 98 Stat. 1070, codified at 42 U.S.C. 1395u(j)(1)(A). In light of this history of regulation,

petitioners, who allege that they have provided in-hospital anesthesia services since January 1, 1991, C.A. App. A47, have no reasonable expectation that they will have unfettered authority to charge Medicare patients any fee they deem appropriate.

2. Petitioners base their argument that review is warranted primarily (Pet. 8-11) on Justice Scalia's separate opinion in *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988). In his separate opinion, Justice Scalia argued that a rent control statute constituted a taking insofar as it required consideration of hardship to the tenant in calculating the rent, because the statute required landlords to assume the cost of remedying a social problem they had not caused: the inability of some tenants to pay their rent. *Id.* at 20-22. As an initial matter, the approach advocated in that separate opinion has not been adopted by the Court, which has continued to weigh the character of the governmental action, the severity of the economic impact on the claimant, and whether the statute interferes with reasonable investment-backed expectations. See, *e.g.*, *Concrete Pipe & Products of California, Inc.*, 113 S. Ct. at 2290-2291.

Moreover, this is not a case in which the approach advocated in the separate opinion in *Pennell* should lead to a different result. The rent control statute at issue in *Pennell* had no provision under which the City of San Jose paid a portion of the rent owed by poor residents. Medicare, in contrast, provides funds for payment of 80% of the federally determined amount. In addition, the rent control statute at issue in *Pennell* envisioned reduction of the allowable rent below an amount determined to be reasonable if the tenant could not afford to pay the reasonable rent. 485

U.S. at 21. Medicare, in contrast, allows physicians to charge 115% of the federally determined amount. Because Medicare provides funds to pay a large portion of physicians' fees—and because the challenged statutory provision allows physicians to collect 15% more than their colleagues who accept assignment of Medicare claims—no reasonable test could lead to the conclusion that petitioners' property has been taken.

For much the same reason, petitioners' invocation (Pet. 11-12) of *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), is inapposite. The Court in that case was faced with a situation in which "the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good." *Id.* at 2895. Petitioners have not been compelled to treat patients for free. Instead, they merely are forbidden to charge more than 115% of an amount that other physicians find acceptable when they choose to treat Medicare patients.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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